IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. JOSE EDUVIJES BEJARANO III, Petitioner.	2 CA-CR 2007-0142-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20051948

Honorable Christopher C. Browning, Judge

REVIEW GRANTED; RELIEF DENIED

Robert J. Hooker, Pima County Public Defender
By Kristine Maish
Tucson
Attorneys for Petitioner

H O W A R D, Presiding Judge.

¶1 Petitioner Jose Eduvijes Bejarano III seeks review of the trial court's summary denial of the petition for post-conviction relief he filed after the trial court had revoked his probation and sentenced him to a presumptive, 2.5-year prison term.

¶2 Bejarano pled guilty in September 2005 to unlawful possession of a deadly weapon as a prohibited possessor, a class four felony. In October the trial court suspended

imposition of sentence and placed him on probation for four years. Less than five months later, the state filed a petition to revoke probation alleging that, between December 8, 2005, and February 10, 2006, Bejarano had violated assorted conditions of his probation.

¶3 Bejarano admitted two of the violations alleged, and the trial court scheduled a disposition hearing. At the request of the probation department, the court also ordered a pre-disposition psychological evaluation of Bejarano. The disposition hearing was postponed once because the evaluation had not been completed in time. At the rescheduled hearing on April 19, 2006, the trial court revoked Bejarano's probation and imposed the presumptive sentence.

¶4 Before imposing sentence, however, the court learned defense counsel had not yet seen the written report of Bejarano's psychological evaluation, which the court had received and reviewed. The court thus ordered a recess to give counsel time to review the report. After the recess, defense counsel did not ask for additional time to meet or respond to the conclusions in the report but, instead, thanked the court for ordering the evaluation and urged it to continue Bejarano on probation for the reasons counsel had previously set out in a written sentencing memorandum.

¶5 In his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., Bejarano raised two issues. He claimed that the presumptive sentence of 2.5 years was excessive in his case, that the presence of "overwhelming" mitigating circumstances meant the court should have imposed no more than the mitigated term of 1.5 years. Second, he claimed trial counsel had rendered ineffective assistance at the disposition

hearing based on counsel's failure "to review his psychological evaluation prior to the Dispositional Hearing, fail[ure] to consult with Mr. Bejarano about the report and its implications, and failure to meaningfully challenge it by obtaining a second evaluation." Although he suggested a second psychological evaluation or evidence contradicting the first evaluation would likely have led the trial court to a different sentencing decision, Bejarano failed to specify the portions of the first evaluation with which he disagreed or even to attach a copy of the challenged report to his petition below.

¶6 Finding neither of Bejarano's claims colorable, the trial court declined to hold an evidentiary hearing and denied relief in a five-page minute entry in which it addressed the substance of both of Bejarano's claims. After reviewing again the various mitigating factors Bejarano had presented, the court declined to modify the sentence it had originally imposed. The minute entry states:

> The Court is unable to conclude that the Petitioner's sentence was excessive. Petitioner was sentenced to a presumptive term, well with[]in the statutory range that Petitioner voluntarily agreed to accept by admitting that he was in violation of his probation. Petitioner has failed to produce any evidence to support his claim that the sentencing decision by this Court was arbitrary or capricious or was the result of an inadequate investigation into the facts relevant to sentencing.

See generally State v. Patton, 120 Ariz. 386, 388, 586 P.2d 635, 637 (1978) (appropriate sentence within statutory range rests in trial court's discretion; abuse of discretion characterized by arbitrariness, capriciousness, or failure to conduct adequate investigation into necessary facts).

¶7 "The trial court is not required to find mitigating factors just because evidence is presented"; it is only required to consider the evidence. *State v. Fatty*, 150 Ariz. 587, 592, 724 P.2d 1256, 1261 (App. 1986). Ultimately, "[h]ow much weight should be given proffered mitigating factors is a matter within the sound discretion of the sentencing judge." *State v. Towery*, 186 Ariz. 168, 189, 920 P.2d 290, 311 (1996). Although the trial court gave the mitigating factors here less weight than Bejarano would have liked, he has failed to demonstrate that the court abused or exceeded its discretion, either in imposing the presumptive sentence initially or in ratifying its original decision by denying post-conviction relief. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990) (we will not disturb trial court's grant or denial of post-conviction relief "unless an abuse of discretion affirmatively appears").

¶8 The trial court likewise found no merit to Bejarano's claim of ineffective assistance of counsel at the disposition hearing. Stating a colorable claim of ineffective assistance requires showing both that counsel's performance fell below an objectively reasonable professional standard and that the deficient performance caused prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985); *State v. Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d 113, 114 (App. 2004).

¶9 The trial court here effectively found Bejarano had established neither deficient performance nor prejudice. After suggesting counsel may have even exceeded the prevailing standard of practice by preparing and filing a sentencing memorandum on

Bejarano's behalf, the court further observed that counsel's efforts had "persuaded the Court to impose a presumptive sentence, when the Court could have imposed an aggravated sentence." The court added, "This potentially saved the Petitioner one-and-one-quarter (1.25) years in prison." Further, the court noted, Bejarano had failed to support his assertion of ineffectiveness with an affidavit from any attorney and had similarly provided no extrinsic support for his claim that the psychological evaluation of Bejarano "was incorrect in any of its content or conclusions. Essentially, Petitioner merely asserts a number of unsupported claims, all of which are contrary to the Court[']s own observations of the proceedings."

¶10 On the record before us, we agree with the trial court's assessment that Bejarano failed to make a colorable showing of either deficient performance or prejudice. As a result, because we are unable to say the trial court abused its discretion, we grant the petition for review but deny relief.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Judge

PETER J. ECKERSTROM, Judge